IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
***Plaintiff*,**	:	**CIVIL ACTION**
	:	
v.	:	
	:	**No. 15-cr-544**
ABDOU KOUDOS ADISSA,	:	
***Defendants*.**	:	

MEMORANDUM

PRATTER, J. JANUARY 14, 2019

Abdou Koudos Adissa seeks relief under 28 U.S.C. § 2255 from his March 2017 conviction for conspiracy to commit access device fraud. Mr. Adissa argues that he is entitled to such relief because he received ineffective assistance of counsel at his trial and in connection with sentencing. Because Mr. Adissa cannot demonstrate ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), his petition is denied.

BACKGROUND

In October 2012, state authorities arrested Abdou Koudos Adissa for his participation in a scheme involving gift cards encoded with stolen credit card numbers. Three months later, he pleaded guilty in state court to criminal conspiracy and was sentenced.

After his release from jail on January 8, 2014, authorities suspected Mr. Adissa of participating in a separate stolen identity refund conspiracy. In this scheme, the conspirators filed false tax returns in names based on stolen identities and had refunds deposited onto Green Dot prepaid cards. On June 6, 2014, authorities executed a search warrant for Mr. Adissa's apartment, which he shared with a co-conspirator. Agents found 203 Green Dot cards in Mr. Adissa's room alone, 106 of which were found in an empty television box next to Mr. Adissa's bed.

Mr. Adissa went to trial for, and was found guilty of, one count of conspiracy to commit access device fraud, in violation of 18 U.S.C. § 371. Under the Sentencing Guidelines, Mr. Adissa had a Total Offense Level of 22 and a Criminal History Category of II, leading to an advisory range of 46–57 months of imprisonment. At the conclusion of the sentencing hearing, the Court imposed a sentence of 48 months of imprisonment and three years of supervised release. Mr. Adissa was also ordered to pay $252,940 in restitution to the federal government tax authorities.

Mr. Adissa appealed his case but ultimately withdrew that appeal to seek relief under 28 U.S.C. § 2255 instead. On July 13, 2018, Mr. Adissa filed a § 2255 petition with this Court alleging ineffective assistance of counsel.

LEGAL STANDARD

Section 2255 allows a prisoner in custody to attack his sentence if it was "imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Thus, a petitioner may only prevail on a Section 2255 claim by demonstrating that an error of law was constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962).

Mr. Adissa has filed his § 2255 petition *pro se*. For practical purposes, *pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Accordingly, Mr. Adissa's *pro se* petition is construed liberally. *See Royce v. Hahn*, 151 F.3d 116, 118 (3d Cir. 1998). Nonetheless, the petition must meet certain basic standards, as discussed below.

DISCUSSION

Mr. Adissa claims his counsel was ineffective in three ways. As explained below, the Court denies his § 2255 petition because he fails to meet the requirements of an ineffective assistance of counsel claim under *Strickland*, 466 U.S. 668. The Court also declines to hold an evidentiary hearing because the record as a whole conclusively demonstrates that Mr. Adissa is not entitled to relief. Lastly, the Court will not issue a certificate of appealability in this case.

I. Ineffective Assistance of Counsel Claims

Mr. Adissa alleges that he received constitutionally ineffective assistance of counsel by his trial counsel, Nino Tinari, in three separate areas: (1) failure to request a competency hearing at his trial, (2) failure to call an available mental health witness at the sentencing hearing, and (3) failure to argue diminished capacity at sentencing.

In order to bring a claim for ineffective assistance of counsel, a petitioner must satisfy the two-prong test established by the Supreme Court of the United States in *Strickland*, 466 U.S. at 687–88.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

There is no exhaustive list of rules that counsel must satisfy to adequately represent his client. *Id.* at 688–89. Instead, given the individual nature of each case, each defendant, and each professional, judicial "scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the

distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. The court must then consider the identified acts and omissions and determine whether they "were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.*

A petitioner must satisfy both *Strickland* prongs to successfully maintain an ineffective assistance of counsel claim. *Id.* at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). And, a "court can choose to address the prejudice prong before the ineffectiveness prong and reject an ineffectiveness claim solely on the ground that the defendant was not prejudiced." *Rolan v. Vaughn*, 445 F.3d 671, 678 (3d Cir. 2006).

A. Failure to Request Competency Hearing

Mr. Adissa believes that his trial counsel should have requested a competency hearing because Mr. Adissa was severely depressed, suffered childhood sexual abuse, and abused alcohol. "A defendant has a due process right not to be tried while incompetent." *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001). For a defendant to be competent to stand trial, he "must have 'a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and must possess 'a rational as well as factual understanding of the proceedings against him.'" *Id.* (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)); *see also United States v. Leggett*, 162 F.3d 237, 242 (3d Cir. 1998) (same). Trial counsel should request a competency hearing where "there is reason to doubt the defendant's competence to stand trial."

United States v. Haywood, 155 F.3d 674, 680 (3d Cir. 1998); *see also Cherys v. United States*, 552 F. App'x 162, 167 (3d Cir. 2014).

"The crux of [Mr. Adissa's] claim, as it has been presented to [this Court], is that counsel sat idly by without recognizing that [Mr. Adissa] was incompetent to stand trial, or at a minimum, that there were reasons to doubt his competence." *Jermyn*, 266 F.3d at 300. Read with even the most indulgent eye, there is nothing in Mr. Adissa's petition to suggest that he was unable to consult with his lawyer at the time of his trial or that he lacked an understanding of the proceedings against him. He only cursorily alleges that he did not understand the proceedings against him in his reply brief by listing the disorders that affected him. Reply Brief at 2 (Doc. No. 98) ("Petitioner's attorney provided deficient performance in not requesting a competency hearing as Petitioner was not competent to stand trial and did not comprehend the proceedings against him as he is suffering from Major Depression, Post-Traumatic Stress Disorder (PTSD), Alcohol use Disorder as a result of mental, physical as well as sexual abuse.").

Courts within this circuit have denied relief to petitioners under § 2255 in situations similar to those listed by Mr. Adissa in conclusory fashion. *See Feliciano v. United States*, Cr. No. 13-327, 2016 WL 1449232, at *4 (E.D. Pa. Apr. 13, 2016) (denying a § 2255 petition on similar grounds even though the petitioner was "sad" and regularly meeting with psychologists because he actively participated in his plea colloquy and demonstrated an understanding of the proceeding and its import); *United States v. Webb*, Cr. No. 09-755, 2014 WL 2883923, at *11 (E.D. Pa. June 24, 2014) (concluding that the petitioner had "not alleged that he was unable to consult with his lawyer or that he did not understand the proceedings against him" even though he claimed he suffered a brain aneurysm and often had problems focusing and understanding what was happening in the courtroom).

In his reply brief, Mr. Adissa claims that his alcohol abuse also affected his ability to focus and assist counsel during his trial. Reply Brief at 6–7 (Doc. No. 98). He says that he drank every day, including during trial, sometimes to the point of blacking out to forget his history of physical, mental, and sexual abuse. Mr. Adissa argues that his case is akin to *United States v. Renfroe*, 825 F.2d 763, 766–67 (3d Cir. 1987), in which the Third Circuit Court of Appeals concluded that the trial court should have ordered a competency hearing when the defendant abused cocaine for 16 years, a doctor testified that such an addiction would affect the defendant's ability to assist counsel, and his attorney testified that the defendant was unable to aid in his own defense.

Mr. Adissa's case is quite different, however. Mr. Adissa never contends that his counsel was aware of his alcohol abuse at the time of his trial. The first mention of Mr. Adissa's history of alcohol use was in a psychiatrist's report dated September 24, 2017 – six months *after* Mr. Adissa's trial. *See* Petition, Ex. 2 Dr. Juel Nall Report at 15–16 (Doc. No. 92). Nor does the report indicate that Mr. Adissa was abusing alcohol to the extent he says he was during his trial. Mr. Adissa has not provided the Court with any facts that demonstrate his counsel, Mr. Tinari, was or should have been aware of the alleged alcohol abuse and should have requested a competency hearing on his behalf because of it.

This Court observed Mr. Adissa before, during, and after his trial, and saw nothing to raise any concern or any indication of incompetence. He appeared to understand the proceedings and be an active participant in his own defense. Mr. Adissa even testified at trial through an interpreter. He understood the questions and answered them promptly and appropriately. Nothing in his behavior, statements, or affect led the Court to believe there was an issue regarding Mr. Adissa's competence.

In his petition, Mr. Adissa now describes discussing his mental health and troubled childhood with his lawyer, but this actually underscores that he actively consulted with his counsel. Mr. Adissa also submitted email correspondence with his counsel from September 2017. *See* Petition, Ex. 3 Emails (Doc. No. 92). Although these emails are dated subsequent to his trial and were written in preparation for his sentencing, Mr. Adissa is actively communicating with counsel in them and proposing potential mitigating factors to reduce his sentence.[1] Although the emails are undoubtedly not exhaustive, they do not anywhere reference Mr. Adissa's alcohol dependence or abuse.

This Court will not second guess trial counsel's decision to forego a competency evaluation in Mr. Adissa's case. Counsel's decision did not fall below an objective standard of reasonableness and therefore fails the first prong of *Strickland*, 466 U.S. 668.

B. Failure to Call a Mental Health Witness at Sentencing

Mr. Adissa next alleges that his counsel was ineffective for failing to call social worker Tanya Bland as an expert to discuss his mental health at the sentencing hearing. Ms. Bland assisted psychiatrist Dr. Juel Nall in evaluating Mr. Adissa prior to sentencing.[2] A copy of the evaluation, signed by Dr. Nall, was submitted to, and considered by, the Court. Although Ms. Bland was available and in court at Mr. Adissa's sentencing, Mr. Tinari did not call her. In her letter, Ms. Bland claims that she was "shocked" by this action and, when she asked Mr. Tinari

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[1] Mr. Adissa only appears to be arguing that his counsel was ineffective for failing to request a competency hearing before trial. In the event that he is also arguing that his counsel should have requested a competency hearing at the sentencing phase, these emails persuasively show that Mr. Adissa was able to consult with his lawyer with a demonstrable degree of rational understanding and that he understood the proceedings against him. They also demonstrate Mr. Adissa's cogent participation in strategizing how to proceed.

[2] Ms. Bland's name does not appear anywhere on Dr. Nall's evaluation report; however, she submitted a letter dated September 28, 2017, which asserts that she participated in Mr. Adissa's interviews. *See* Petition, Ex. 4 Tanya Bland Letter (Doc. No. 92).

why he did not call her, he supposedly replied that "it wouldn't have made a difference anyway." Petition, Ex. 4 Tanya Bland Letter (Doc. No. 92).

Mr. Adissa's claim in this regard fails the prejudice prong of *Strickland*, 466 U.S. 668. Even if Mr. Tinari's failure to call Ms. Bland was deficient, and the Court reaches absolutely no conclusion or concern that it was, and even overlooking the hearsay nature of Ms. Bland's letter, Ms. Bland's testimony would not have changed the outcome of Mr. Adissa's sentencing because the Court already considered the report upon which her testimony supposedly would have relied or in which her views were incorporated. The Court was well aware of Mr. Adissa's mental health, history of abuse, and other background information. *See* Sentencing H'rg Tr. 8:15–19 ("In addition to that, I've received and I have reviewed a number of other things from Mr. Tinari on behalf of the defendant. I received just, I guess, a couple of days ago a report from a doctor named Juel Nall, a report dated September 24th, 2017."); *see also Id.* at 25:16–17 (stating that the Court will consider all the individual facts of the case); *Id.* at 46:14–47:6 (referencing Dr. Nall's report and the hardships in Mr. Adissa's life); *Id.* at 58:14–25 (permitting Dr. Nall's report to be attached to the probation officer's Pre-Sentence Investigation Report). There is no reason for the Court to now think that Ms. Bland's testimony would have added new information or insight or otherwise altered in even the slightest way the Court's sentencing decision.

C. Failure to Argue Diminished Capacity at Sentencing

Lastly, Mr. Adissa argues that his trial counsel should have requested a sentencing departure pursuant to USSG § 5K2.13 because of his significantly reduced mental capacity. Section 5K2.13 permits a downward departure for non-violent offenses if "(1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense." The commentary defines significantly reduced mental capacity to mean "the

defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." USSG § 5K2.13.

The Third Circuit Court of Appeals has "recognized that the term 'mental capacity' as used in section 5K2.13 encompasses both a cognition prong *and* a volition prong." *United States v. McBroom*, 124 F.3d 533, 546 (3d Cir. 1997) (emphasis in original). In other words, a person may be suffering from a "reduced mental capacity" if "(1) the person is unable to absorb information in the usual way or to exercise the power of reason; or (2) the person knows what he is doing and that it is wrong but cannot control his behavior or conform it to the law." *Id.* at 548. "Sentencing courts must consider both prongs before making a determination about a defendant's 'reduced mental capacity.'" *Id.*

Even if Mr. Tinari had argued for this departure, it would have been utterly futile because there is no reason to suspect that Mr. Adissa, now or at any previous time, suffered from a reduced mental capacity. As such, Mr. Adissa's claim that his counsel was ineffective for failing to request a downward departure pursuant to USSG § 5K2.13 also fails the prejudice prong of *Strickland*, 466 U.S. 668.

Cognitively, Mr. Adissa has demonstrated that he has the mental capacity to absorb information and exercise the power of reason. According to Dr. Nall's report, Mr. Adissa graduated from high school in his home country of Benin in 2008 with high marks. He completed about two years of college but dropped out due to bad grades. Mr. Adissa says that he lost focus because El Mouyassar Kamal Gangbo (who participated in the Green Dot card scheme that led to this conviction and also attended high school with Mr. Adissa) was a bad influence on him. Mr. Adissa was accepted by the University of Texas and intended to study English as a

second language. He entered the United States on a student visa but never made it to Texas. Although Mr. Adissa spoke little to no English when he arrived, he now speaks the language with some fluency. Mr. Adissa certainly had the capacity to understand his fraudulent behavior as charged in the crime at issue in this federal matter which, the Court is constrained to note, followed quickly on the heels of his release from jail on a similar fraud scheme as prosecuted in the state courts. It appears only that the earlier conviction could not have been misunderstood by Mr. Adissa but did not deter him.

And, volitionally, Mr. Adissa does not assert that he lacked control of his behavior at the time he committed the crimes. Dr. Nall's report, which was compiled from interviews that took place in August and September 2017 and information from the presentence report, states that Mr. Adissa suffers from Posttraumatic Stress Disorder, Major Depressive Disorder, and Alcohol Use Disorder. The report goes on to say that Mr. Adissa was at risk for being exploited in adulthood as a result of his childhood sexual abuse and Mr. Gangbo's emotional abuse. He now believes Mr. Gangbo manipulated him into committing bad acts.

In addition to detailing Mr. Adissa's troubled past, the report also states that Mr. Adissa was oriented to person, time, place, and situation during the interviews; was cooperative; exhibited goal-oriented thought processes; answered questions appropriately; was coherent; and appeared to have good social judgment and appropriate awareness of social expectations. There is nothing to suggest that he lacked the ability to control his actions as they related to the Green Dot card scheme at issue.[3]

Mr. Adissa now argues that he is a byproduct of his upbringing and that his troubled past inherently led to his criminal behavior. As noted above, the Court took these facts into

[3] The Court notes that Mr. Adissa denies *participating* in the unlawful acts that led to this conviction. He did not deny understanding that such acts are unlawful.

consideration at sentencing. The Court even discussed the futility of an argument such as this at the sentencing hearing. Although the Court did not believe Mr. Adissa was making the argument at that time, the Court stated:

> You are not, as far as I am concerned, the product of your own personal history. . . . So it is not inevitable that somebody who was abused in some fashion or didn't get to go to the best schools and learn or had to work at jobs that they were not happy with, that does not mean that they will inevitably commit a crime or that they are excused for doing that.

Sentencing H'rg Tr. 46:14–47:6.

Mr. Adissa was not prejudiced by his counsel's failure to request a departure via Section 5K2.13 of the sentencing guidelines.

II. Hearing

A district court is required to hold an evidentiary hearing on a motion to vacate sentence filed pursuant to 28 U.S.C. § 2255 unless the motions, files and records of the case show conclusively that the movant is not entitled to relief. 28 U.S.C. § 2255; *see also United States v. Booth*, 432 F.3d 542, 545-46 (3d Cir. 2005); *United States v. Dawson*, 857 F.2d 923, 927 (3d Cir. 1988) (internal quotation marks and alteration omitted) (stating that the district court must accept all of the petitioner's non-frivolous allegations as true and order an evidentiary "hearing unless the record as a whole conclusively shows that the prisoner is entitled to no relief."). Although the baseline the movant must meet to secure an evidentiary hearing may be considered admittedly low, *Booth*, 432 F. 3d at 546, it is clear from the files and records of this case that Mr. Adissa is entitled to no relief. Thus, he is not entitled to a hearing in this case.

III. Certificate of Appealability

When a district court issues a final order denying a § 2255 petition, the court must also make a determination about whether a certificate of appealability should issue or the clerk of the

court of appeals shall remand the case to the district court for a prompt determination regarding whether a certificate should issue. Based upon the motion and files and records of the case, and for the reasons set forth above, the Court finds that Mr. Adissa has not exhibited a substantial denial of a constitutional right. A certificate will therefore not issue.

CONCLUSION

For the reasons discussed above, Mr. Adissa's § 2255 petition will be denied, and a Certificate of Appealability will not issue. An appropriate order follows.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
***Plaintiff*,**	:	**CIVIL ACTION**
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v.	:	
	:	**No. 15-cr-544**
ABDOU KOUDOS ADISSA,	:	
***Defendants*.**	:	

ORDER

AND NOW, this 14th day of January, 2019, upon consideration of Petitioner Abdou Koudos Adissa's § 2255 Motion to Vacate/Set Aside/Correct a Sentence (Doc. No. 92), the Government's Opposition to the Motion (Doc. No. 95), and Mr. Adissa's Reply (Doc. No. 96), it is **ORDERED** that:

1. The Motion (Doc. No. 92) is **DENIED** for the reasons set forth in the Court's Memorandum Opinion;
2. No certificate of appealability will issue because reasonable jurists would not disagree with this denial of Mr. Adissa's Motion;
3. The Clerk of Court shall mark this matter **CLOSED** for all purposes, including statistics.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE